

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

KENNETH COLVIN, JR.,

Plaintiff, Case No. 2:09-cv-96

v.

Honorable R. Allan Edgar

MICHAEL MARTIN,

Defendant.

/

ORDER APPROVING AND ADOPTING
MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

On June 24, 2011, United States Magistrate Judge Timothy P. Greeley issued a report and recommendation ("R&R") recommending that Plaintiff Kenneth Colvin's motion for default judgment pursuant to Rule 37 [Doc. No. 225] and his motion requesting that Defendant Michael Martin be ordered to respond [Doc. No. 237] be denied, because Plaintiff failed to show that Defendant failed to participate in discovery. [Doc. No. 245.] Plaintiff filed an objection to the R&R on July 8, 2011. [Doc. No. 256.]

This Court is required to make a *de novo* determination of those portions of the R&R to which objections have been filed, and may accept, reject, or modify any or all of the Magistrate Judge's findings or recommendations. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b).

Plaintiff states multiple objections to the recommendation that his motions be denied. First, he argues that Magistrate Judge Greeley should have required the Defendant to respond to his default judgment motion. He further argues that Magistrate Judge Greeley erred in not explaining the basis

of his belief that Plaintiff had not proven that Defendant engaged in fraudulent actions which could be construed as failing to participate in the discovery process. His last argument focuses on the admissibility of the evidence at issue in his motion for default judgment, an “MDOC Prisoner Religious Meal Worksheet.”

Plaintiff’s first objection is without merit, as Magistrate Judge Greeley’s decision was based on his belief that Plaintiff had not proven that Defendant engaged in fraudulent actions. This was a decision that could be reached after considering Plaintiff’s motion without considering a response from Defendant.

This Court agrees with Magistrate Judge Greeley’s determination that Plaintiff has not proven a failure on Defendant’s part to engage in the discovery process. Federal Rule of Civil Procedure 37 provides that a court may impose sanctions, including entering a default judgment, on a party that “fails to obey an order to provide or permit discovery.” Fed. R. Civ. P. 37(b). The default judgment sanction is the “strongest weapon” in the district court’s arsenal. *Grange Mutual Casualty Co. v. Mack*, 270 Fed. Appx. 372, 376 (6th Cir. 2008). As such, it is not appropriate unless there is a showing of “willfulness, bad faith, or fault” on the part of the party who has failed to comply. *Peltz v. Moretti*, 292 Fed. Appx. 475, 478 (6th Cir. 2008) (internal quotation omitted). In this case, Plaintiff does not attempt to show that Defendant failed to respond to any of his discovery requests. Instead, he discusses alleged factual inconsistencies that, he argues, show that Defendant’s assertions regarding the religious worksheet submitted during discovery are fraudulent. He focuses on factors such as format differences between the worksheet at issue and a worksheet used for a different prisoner that was allegedly prepared on the same date to support his argument that Defendant did not actually create the worksheet on the date alleged. The Court finds that none of the alleged inconsistencies discussed by Plaintiff go so far as to show that Defendant submitted fraudulent

responses to discovery requests. In his brief, Plaintiff cites to a district court case to show that a party's knowing submission of a fraudulent document to the court is grounds for dismissal, though not by Rule 37. *Campos v. Correction Officer Smith*, 418 F.Supp.2d 277, 278 (W.D.N.Y. 2006). That case involved submission of a letter, dated in 2003, that was written to appeal a 2004 grievance, which led to the court's "inescapable" conclusion that "plaintiff has knowingly submitted a falsified exhibit[.]" *Id.* The facts of that case are clearly distinguishable from the facts of this one, where no evidence has been presented that would lead to such an inescapable conclusion. Plaintiff has failed to show that Defendant failed to comply with the discovery process, and default judgment pursuant to Rule 37(b) is therefore inappropriate.

Plaintiff's final objection focuses on the admissibility of the evidence at issue in his motion. A Court's decision to impose sanctions pursuant to Rule 37(b) is based on a party's failure to comply with a discovery order, not on an incident where a party provides documents during the discovery process that may be inadmissible at trial. As this Court noted in an earlier order involving this same piece of evidence, Plaintiff may challenge the credibility of Defendant or the worksheet's admissibility at trial, [Doc. No. 130], but questions of admissibility are irrelevant to this motion.

For the reasons stated above, it is ordered that Plaintiff's objections to the R&R [Doc. No. 256] are OVERRULED. It is further ordered that Magistrate Judge Greeley's June 24, 2011 R&R [Doc. No. 245] is APPROVED and ADOPTED as the opinion of the Court. Plaintiff's motions for default judgment [Doc. No. 225] and to require a response to the default judgment motion [Doc. No. 237] are DENIED.

SO ORDERED.

Dated: 7/25/2011

/s/ R. Allan Edgar
R. ALLAN EDGAR
UNITED STATES DISTRICT JUDGE